IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2201 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KAMLESH N DAVE - Petitioner(s)

Versus

STATE OF GUJARAT & 4 - Respondent(s)

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Appearance :

MR DA BAMBHANIA for Petitioner(s) : 1,
MR LB DABHI, AGP for Respondent(s) : 1 - 2.
RULE SERVED for Respondent(s) : 3 - 5.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 07/02/2006

ORAL JUDGMENT

1. The petitioner has filed this petition under Article 226 of the Constitution of India praying for direction to the respondents to

consider the petitioner's case for promotion to the post of Asstt. Geologist with effect from the date due and from the date juniors were considered for promotion and appointed vide order dated 31.7.1991 and 24.12.1991. The petitioner has also prayed for the direction to the respondents to confer upon the petitioner all benefits of service including pay fixation, arrears of pay, seniority, further promotions etc, on the basis of the petitioner having been promoted to the post of Asstt. Geologist from due date. The petitioner has also prayed for the direction to appoint the petitioner to the post of Asstt. Geologist, by operating the wait list of Asstt. Geologist prepared and sent to the G.A.D from the due date of selection and placing on wait list and from the date of vacancies fallen vacant for the post of Asstt. Geologist Class-II.

2. The petition was admitted and rule was issued on 22.12.1993. However, interim relief was refused.

3. It is the case of the petitioner that the petitioner was selected to the post of Geologist Assistant by the Department of Geology & Mining and has been appointed vide order dated 6.2.1982, initially on probation of one year and on successful completion of probationary period, on regular appointment under the administrative control of respondent No.2. It is further stated that the petitioner passed the departmental examination conducted by GPSC in September, 1982 within prescribed time and chances and stood first in the merit list. The petitioner was selected for the post of Asstt. Geologist Class-II by the GPSC and was placed at Sr. No.9 in the wait list. It is the case of the petitioner that though the

posts of the Asstt. Geologist were vacant, the respondent Nos.1 and 2 did not fill in on one or another pretext, when the turn of the petitioner's turn came and as such the petitioner was discriminated by arbitrary actions of the respondents. It is also the case of the petitioner that during the period between 1980 to 1986 there was not a single adverse remark or any notice has been given and all of a sudden in the year 1986-87 when the petitioner claimed higher post by way of promotion and on account of direct selection, all the attempts cropped out by the than Officer Incharge against the petitioner. It is further stated that on account of genuine casual reasons, the petitioner put up leave reports and though the casual leaves are meant for casuality, the petitioner was called on to explain after more than one year of time duration. The petitioner explained the

circumstances, however the Senior Geologist made an order granting leave without pay. It is further stated that the said adverse remark was made in the confidential report despite the fact that there is no such ground. It is further stated that since the petitioner was given preferential role and duties by the higher authorities, including in launching any programme outside State or within and attending programmes with higher officers, the Senior Officer has put up adverse entries in the Confidential Report, based on flimsy grounds, and with malicious intention. There was no justification in making such adverse remark in the Confidential Report of the petitioner. It is further stated that the petitioner made representations on 8.8.1988 and 28.6.1989 against the said adverse entries for the period from 1.4.1987 to 31.3.1988, 1.4.1988 to 4.5.1988 and 18.4.1988 to 17.1.1989 to the

authorities concerned. However, the said representations were not decided and pending the decision over the representations the respondents have promoted to the juniors of the petitioner. It is also the case of the petitioner that the petitioner made further representations 3.8.1991, 1.1.1992, 4.3.1992 and 7.3.1992. However, the said representations were not decided.

4. Mr.D.A.Bambhania, learned advocate appearing for the petitioner has submitted that the law is well settled on the point. The adverse remarks are of very minor nature and though the representations were pending against the said remarks, the respondent authorities have taken into consideration the adverse remarks while considering the case of the petitioner and have given promotion to the juniors. This is contrary to the well settled legal position and

hence the action of the respondents is required to be quashed and set aside. He has further submitted that in view of the rules framed by the State concerning to Confidential Reports, its evaluation and reporting reviewing and interpreted by this Court, during the pendency of the decision on representations against such adverse remarks, the same ought not to have been considered for promotion to the higher posts. The action of the respondents not to consider the petitioner for promotion on account of adverse remarks, against whom the representations were pending for final decision, is illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India. Mr.Bambhania has further submitted that the respondent authorities seem to have been proceeded on the footing that the case of adverse entries could not be considered, otherwise it would obvious that the petitioner

was due for promotion prior to the juniors to the petitioner and also right from 1985-86 and, therefore, there is no reason whatsoever not to consider the petitioner's case for the post of Assistant Geologist at the time when juniors were considered and as such petitioner's non promotion was, therefore, not justified on any rationale or equitable belief which will have effect of imposing of penalty in violation of principles of natural justice. He has, therefore, submitted that the relief prayed for in the petition is required to be granted.

5. On behalf of respondents an affidavit in reply is filed by Under Secretary, Industries and Mines Department, Sachivalaya, Gandhinagar. Mr.L.B.Dabhi, learned AGP appearing for the respondents has submitted that the Departmental Promotion Committee which met on 26.11.1990 considered the case of the petitioner alongwith

others for promotion to the post of Assistant Geologist but he was not found fit to be included in the select list for promotion to the post of Assistant Geologist as his Confidential Reports for the year 1987-88 and 1988-89 contained adverse remarks which were communicated to him on 28.6.1988 and 2.6.1989. It is further submitted that the petitioner has represented his case against the above adverse remarks vide his letter dated 28.6.1989, which was also considered by the DPC. It is true that the juniors who were included in the select list in the aforesaid meeting of the DPC were promoted vide orders dated 3.7.1991 and 21.12.1991. He has, however, denied the contention of the petitioner that he was not considered for promotion to the post of Asstt. Geologist. He has further submitted that the Gujarat Public Service Commission advertised three vacancies of Asstt. Geologist in August

1982 and selected the candidates by interview. However, all the three candidates who were included in the merit list prepared by the Commission were appointed by respondents in May 1984 whereas the petitioner was placed at Sr.No.9 in the waiting list which was kept by the Commission for the purpose of future requirement of Government. The select list which was prepared in December, 1983 had expired on 19.12.1985. He has further submitted that the recruitment rules for the post of Asstt. Geologist provided for the ratio of 50:50 for direct selection as well as for promotion, and sufficient vacancies in the quota of direct recruitment were not available at the relevant point of time to accommodate the petitioner who was at Sr. No.9 in the waiting list and, therefore, he could not be appointed. Mr.Dabhi further submitted that there were adverse remarks in the Confidential

Reports for the period from 3.11.1981 to 10.2.1982, 1.4.1984 to 31.3.1985, 1.4.1985 to 31.8.1985, 1.4.1987 to 31.3.1988, 1.4.1988 to 4.5.1988, 18.4.1988 to 17.1.1989. He has, therefore, submitted that it is not true and correct to say that all of a sudden in the year 1986-87 the higher officer was prejudiced with the petitioner with malice as alleged by the petitioner. He has further submitted that the representations of the petitioner dated 27.8.1988 and 28.6.1989 against the adverse remarks in his Confidential Reports for the period from 1.4.1987 to 31.3.1988 and 1.4.1988 to 17.1.1989 were taken into consideration by DPC held on 26.11.1990. The petitioner was communicated by the respondent authority that the representations were not accepted by Government vide letter dated 8.3.1994.

6. Over and above this fact, Mr.Dabhi further

pointed out that after filing of the present petition certain further developments were taken place. The petitioner vide his leave application dated 1.6.1993 applied for earned leave from 21.6.1993 to 31.7.1993 for 41 days with permission to leave head quarters. But he had not given his address during leave period. Further vide his letter dated 15.7.1993 he had requested for earned leave for the period 1.8.1993 to 10.9.1993. The petitioner vide his letter dated 10.11.1993 intimated that as his wife was sick at America he left for America. The petitioner has not taken any permission to leave the country from the respondents. Since the petitioner did not resume duty after the expiry of his earned leave i.e on 11.9.1993he was asked to report on duty forthwith vide Regd.A.D. Letter dated 30.6.1994, 24.8.1994, 12.9.1994, 24.10.1994 and respondent's notice dated 16.8.1984 and 1.12.1994 and order dated

16.8.1995. Since the petitioner did not act as asked for, he was further asked to present before respondent No.2 vide letter dated 28.2.1995. As the petitioner did not bother to report on duty the petitioner was issued a charge sheet on 8.5.1995 and an inquiry was constituted against him. The hearing of the inquiry was fixed on 6.7.1995 which was communicated to the petitioner on 22.6.1995. Since the petitioner did not turn up for the hearing, the petitioner was given another date as 6.7.1995. In the meantime, the respondent No.2 had issued a final notice to the petitioner intimating that all the leaves requested by the petitioner were cancelled and he was asked to report on duty latest by 30.9.1995. As the petitioner did not follow the instructions, a public notice in the newspaper was published on 28.11.1995, wherein it is stated that the petitioner had to report

on duty within 15 days from the date of publication of the notice. Looking to the insubordination of the petitioner and his continuous unauthorised absence from 1.6.1993 was treated as leave without pay and it was intimated to the petitioner on 26.2.1996. Since the petitioner neither reported for duty, nor submitted any reply to the notices issued by the respondents nor presented himself before the enquiry officer, respondent No.2 vide his order dated 10.4.1996 removed the petitioner from the Government service. The said order was received by one Mr.Nirajan Dave on behalf of the petitioner at his residence. Mr.Dabhi has further submitted that the said order was passed on 10.4.1996 and it was served at his residential address. The petitioner has not challenged the said order nor he has entered into any communication with respondent. He has, therefore, submitted that looking to the

subsequent developments relief prayed for in the petition cannot be granted.

7. After having heard the learned advocates for the respective parties and after having considered the facts stated and averments made in the memo of petition as well as affidavit in reply, the Court is of the view that it is true that the adverse remarks were made against the petitioner right from 1981-82 onwards. However, for subsequent adverse remarks representations were made by the petitioner, which were pending. No decision was taken on the said adverse remarks. The Departmental Promotion Committee has taken into consideration the adverse remarks as well as representations and found the petitioner not fit for the promotion. If these facts are looked into in isolation, the Court would have shown some indulgence in the matter, but

looking to the subsequent conduct of the petitioner as stated in the affidavit in reply, which has not been controverted by Mr.Bambhania, the Court is of the view that no indulgence can be shown in the matter. From 1993 to 1996 several notices were issued however the petitioner did not remain present. He has not complied with any notice. He has not taken prior permission to leave head quarter. He has not replied to any of the notice. Even public notice was also published in the newspaper. He has not remained present before the Inquiry Officer. Even dismissal order was passed in April 1996. More than 10 years have passed and yet the said order has not been challenged. The Court is, therefore, of the view that for all practical purposes the petitioner's services have come to an end in the respondent establishment. The question of promotion is of no significance now. In this

view of the matter, the petitioner is not entitled to any relief in the present petition. The petition is, accordingly, dismissed. Rule is discharged without any order as to costs.

(K. A. PUJ, J.)

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